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Case No. 89-316

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CITY OF MONTCLAIR, a California City,
Petitioner,

VS.

UNITED ARTISTS COMMUNICATIONS, INC.,
VISTA THEATERS, INC., and
GENERAL CINEMA THEATRE CORPORATION OF CALIFORNIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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13 pp

QUESTION PRESENTED

Does the First Amendment, as interpreted by this Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, prohibit a city from imposing an admissions tax, such that more than ninety percent (90%) of the burden is borne by three (3) movie theaters?

LIST OF PARTIES

The parties to the proceedings below were the petitioner City of Montclair and respondents United Artists Communications, Inc.; Vista Theaters, Inc.; and General Cinema Theatre Corporation of California.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Code

Constitutions

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I

STATEMENT OF THE CASE

In October, 1986, Petitioner City of Montclair (hereafter "City") passed Ordinance No. 86-630 amending Chapter 5 of Title 3 of the Montclair Municipal Code by adding Article 5 thereto to impose an admissions tax. The ordinance imposed a 6% tax on all tickets sold for admission and on admission fees charged for certain prescribed activities.

In addition to Respondents' theatres, the parties stipulated that no more than nine (9) other business entities located in Montclair were potentially subject to the admissions tax: the Holiday Skating Rink, the Laff Stop, the Grand Prix Raceway (when operating), four nightclubs/restaurants that charge an entrance or "cover charge" (the Black Angus Restaurant, Casa Vallarta, Ami Hacienda, and the Green Door), and two adult book stores with

viewing booths (the Apple Adult Bookstore and Paradise Video). (Stipulation of Facts, ¶ 13).

The parties also stipulated to an estimate that not less than ninety percent (90%) of the admissions tax liability would be borne by Respondents' theatres. Other taxpayers exercising First Amendment rights such as the adult bookstores with viewing booths, would also be affected. (Stipulation of Facts, ¶ 14).

REASONS FOR DENYING THE WRIT

1. THE QUESTION PRESENTED IN THIS CASE HAS ALREADY BEEN DECIDED BY THIS COURT IN *MINNEAPOLIS STAR V. MINNESOTA COMMISSIONER OF REVENUE*, AND THE LOWER COURT CORRECTLY INTERPRETED AND APPLIED THAT HOLDING

In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court addressed the very same issue petitioner now brings before it: Is a tax which must be borne by only a handful of taxpayers whose activities are protected by the First Amendment constitutionally valid? The Court concluded it was not.

The Court stated two reasons for its holding: (i) the taxpayer's First Amendment rights were unduly burdened, and (ii) the narrow tax base upset the inherent check on the legislature and created a threat of censorship. The rationale applied in *Minneapolis Star* is equally applicable here. While the taxpayer challenging the tax in *Minneapolis Star* was a newspaper, respondent taxpayers, owners of movie theaters, are likewise protected by the First Amendment. *See Schad v. Bureau of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

A. A Tax Which Singles Out And Unduly Burdens First Amendment Activities Is Presumptively Invalid

A tax which differentiates among taxpayers engaged in First Amendment protected activities is presumptively unconstitutional absent a showing of overriding government interest. *Minneapolis*

Star, 460 U.S. at 575, 582. A tax which classifies taxpayers is suspect whether the classification appears on the face of the statute, arises from its application, or as a result of its impact. As recognized by this Court, a statute challenged under the First Amendment "must be tested by its *operation and effect.*" *Near v. Minnesota,* 283 U.S. 697, 708, 75 L.Ed.2d 1357, 51 S.Ct. 625 (1931) (emphasis added). Respondents do not dispute that Ordinance 86-630 is facially neutral, nor do they contend that the law would have been applied in a discriminatory manner. Rather, Respondents rely on the discriminatory impact the Ordinance would have if applied. It has been established that over ninety percent (90%) of the tax would fall upon Respondents. Clearly, the *effect* of the tax sets Respondents apart from other businesses in the City.

Petitioner contends that the circumstances surrounding the tax imposed on Respondents differ from the circumstances surrounding the newspaper in *Minneapolis Star.* Specifically, petitioner avers that the tax in *Minneapolis Star* did not pass constitutional muster because it (a) on its face applied only to businesses protected by the First Amendment, (b) contained an exemption for smaller businesses and (c) effectively "targeted" a small number of taxpayers. Petitioner claims that since the Ordinance contains no exemptions, it cannot be compared to the tax in *Minneapolis Star.*

The distinction relied upon by petitioner is inconsequential. This Court did not hold that the tax in *Minneapolis Star* was unconstitutional merely because of its terms, but rather because the *effect* of the tax resulted in a disproportionate burden on First Amendment taxpayers. *See Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986) ("In *Minneapolis Star* . . . we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax *had the effect* of singling out newspapers to shoulder the burden"). The number of taxpayers affected by the tax in *Minneapolis Star* was fourteen (14), and two-thirds (⅔) of the entire tax fell upon the Minneapolis Star Tribune.

It is precisely that effect of the tax, that it falls on only a few taxpayers, which makes the Ordinance unconstitutional. Given

the present development of City, only twelve (12) businesses would be subject to the tax, and of the twelve (12), the three (3) Respondents would bear at least ninety percent (90%) of the entire tax. Thus, the burden on Respondents as a result of the admissions tax would be even greater than the burden on the Minneapolis Star Tribune as a result of the paper and ink tax.

As recognized by the Court below:

> Here, just as in *Minneapolis Star* . . . , the tax in question appears to apply to a broad range of businesses, but in reality its burden falls disproportionately upon businesses engaged in protected speech. . . .

United Artists Communications, Inc. v. City of Montclair, 209 Cal.App.3d 245, 252, 257 Cal. Rptr. 124 (1989).

B. A Tax Affecting Only A Handful Of Taxpayers Creates A Threat Of Censorship And Is Constitutionally Invalid

A tax that is not broad-based, i.e., levied against an appreciable number of constituents, provides no inherent protection to taxpayers against undue hardship. In the context of a tax against persons conducting activities protected by the First Amendment, a narrow tax base presents the additional problem of potential censorship. Where a First Amendment activity is curtailed, or where a group of taxpayers engaged in protected activities are singled out, either on purpose or in effect, the government must show a compelling interest to justify the scheme. *Minneapolis Star*, 460 U.S. at 592-593.

> When the State singles out the press . . . , the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. *Minneapolis Star*, 460 U.S. at 585.

In invalidating a tax affecting the exercise of First Amendment rights, the Court need not find that the tax was enacted for any

impermissible or censorial legislative motive. *Minneapolis Star,* 460 U.S. at 579-80, 592-93. "Abridgement of such rights, even though unintended, may invariably follow from varied forms of governmental action." *NAACP v. Alabama,* 357 U.S. 449, 461 (1958). Regardless of the statutory intent, when the application of a general revenue tax in the real world results in only a small number of First Amendment activities being taxed, the tax cannot stand: "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star,* 460 U.S. at 592.

C. Petitioner Has Failed To Make A Showing Of Overriding Governmental Interest Necessary To Uphold A Tax Which Falls Exclusively On First Amendment Taxpayers

Petitioner contends that one interest served by the ordinance is raising revenue. This Court has held, however, that a governmental interest in raising revenue cannot sustain a tax against First Amendment activities. *Minneapolis Star* at 586. In recognition of that well-established principle, petitioner asserts that the admissions tax is not a general revenue raising tax, but rather a tax to defray City's expenses in providing public service to the businesses taxed.

Petitioner's argument is unpersuasive. First, petitioner highlights the financial hardship facing municipalities as a result of Proposition 13. Proposition 13 limits the amount of property taxes available to California cities. Petitioner's portrayal of its financial plight, if anything, illustrates that the tax herein is a general revenue raising device and not one tailored to defray specific costs.

Moreover, Petitioner has provided no evidence that the ordinance was designed to compensate the City for municipal services to respondents and others affected by the tax. Specifically, petitioner contends that "the attraction of large crowds of people on evenings and weekends requires the provision of additional governmental services in off hours." *See* Petition for Writ of Certiorari at 15. Petitioner has failed to introduce any facts in support of its claim either in connection with this petition or in the lower

courts. Moreover, a broad based tax may raise any necessary revenue with less threat to First Amendment protected freedoms than the Ordinance.

Further, the tax would discriminate against establishments having admissions fees. For instance, restaurants or night clubs in the City that do not charge an entrance fee would not be subject to the tax. Theoretically, however, they attract crowds as large as restaurants and night clubs in other parts of the City which do charge an admission fee. Accordingly, the ordinance is not well-fashioned as a means to defray costs for governmental services. Rather, it is a general revenue-raising device.

2. THIS CASE DOES NOT PRESENT FIRST AMENDMENT QUESTIONS SIMILAR TO THOSE PRESENTED IN A CASE PENDING BEFORE THE COURT, *JIMMY SWAGGART MINISTRIES V. BOARD OF EQUALIZATION*

The issue before this Court in *Jimmy Swaggart Ministries v. Board of Equalization,* 204 Cal. App. 3d 151 (1988) *prob. juris. noted,* 57 U.S.L.W. 3687 (April 17, 1989 (No. 88-1374), is whether the imposition of sales and use taxes on a religious organization violates the free exercise clause of the First Amendment. Both the facts and issues in *Swaggart Ministries* differ significantly from those presented in the instant case. In fact, *Swaggart Ministries* highlights *by contrast,* the question presented herein.

First, in *Swaggart Ministries,* the taxpayer is seeking an exemption from a tax, not challenging the tax per se. Second, the tax at issue in *Swaggart Ministries* is a sales and use tax applied throughout the State of California and levied against virtually all tangible assets purchased or brought into the state. There is no dispute that the tax is broad based, not only facially, but also in its application and effect. The issue of potential censorship or governmental interference due to a lack of the inherent checks and balances on governmental action is simply not present.

Conversely, the Ordinance in the instant case was struck down because it imposed a tax with an impermissibly narrow base, only twelve (12) taxpayers would be affected, and of them, the three

(3) Respondents would shoulder ninety percent (90%) of the burden. As demonstrated above, a tax against a limited number of taxpayers creates a potential for abuse which cannot be tolerated, particularly when applied against First Amendment activities.

Third, the tax imposed by the Ordinance will not, as Petitioner suggests, necessarily fall on consumers as opposed to the organization. Petitioner concedes that Montclair is a relatively small city, and as such, movie goers undoubtedly go outside the city to view movies. If the price of admission to Respondents' movies was increased to absorb the cost of the tax, movie goers would likely go elsewhere. Respondents would be compelled to keep prices competitive with the surrounding market, forcing them to pay the tax themselves.

Finally, the tax on items sold by Swaggart Ministries is content neutral. The items taxed were household items and souvenirs, not religious artifacts. In contrast, the Ordinance taxes the activity of viewing movies directly, not an incidental activity, such as buying popcorn or memorabilia.

Given the substantive factual and legal differences between *Swaggart Ministries* and the case at bar, this Court's notation of probable jurisdiction of the former, provides no basis for the Court to grant *certiorari* in the latter.

II

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari filed in this case should be denied.

Dated: September 22, 1989

Respectfully submitted,

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** Mr. London has submitted to the Court his application for admission and all supporting documentation.